In the Supreme Court of the United States.

OCTOBER TERM, 1918.

FRANKLIN KNIGHT LANE, SECRETARY OF the Interior, and Clay Tallman, Commissioner of the General Land Office, appellants,

v.

THE PUEBLO OF SANTA ROSA.

No. 197.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

The Secretary of the Interior and the Commissioner of the General Land Office by this appeal bring up for review a judgment of the Court of Appeals of the District of Columbia reversing the decision of the Supreme Court of the District of Columbia and remanding the case to that court with directions to enter a final decree restraining the Secretary and the Commissioner from offering for entry or listing for entry or sale, as a part of the public domain of the United States, any of the lands

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described in the bill as being lands held by fee-simple title by the Indians of the Pueblo of Santa Rosa in the State of Arizona, and requiring "in so far as lies within their power or control, the correction of the records of the Land Department to prevent in as large degree as possible any further infringement upon the property rights of the plaintiff" (R. 38).

The bill alleges that the plaintiff is, and from time immemorial has been, a town known by the common name of Pueblo of Santa Rosa, composed of civilized, sedentary, and pastoral inhabitants who are, and from time immemorial have been, Pueblo Indians, known by that name and living in permanent houses of substantial construction within the present county of Pima, State of Arizona, said lands being within the territory ceded to the United States by the Gadsden treaty (R. 1–2); that the inhabitants of said pueblo live a communal life and are known as the Pueblo of Santa Rosa; that they have governed themselves according to definite laws and customs having the force of law; that the inhabitants of said pueblo were at the time of the Gadsden treaty citizens of Mexico and are now citizens of the United States; that the laws and customs of the Indians and of Spain and Mexico conceded to the plaintiff, and the plaintiff has exercised from time immemorial, (1) the right to have a common name, the Pueblo of Santa Rosa, (2) the right to hold and dispose of real estate, including the land upon which the village is situated and the surrounding lands,

(3) the right to contract, (4) the right and power to have perpetual succession, (5) the right to sue and be sued as an entity, (6) the right to maintain a town organization and government, and that by virtue of this right is in fact and in law entitled to sue as such (R. 2, 3); that from time immemorial the Pueblo of Santa Rosa has owned, possessed, and occupied the tract of land in Pima County, an area of 720 square miles, on which the village exists; that the boundaries of said land have been definitely fixed and known and recognized, and the ownership and possession of the village by its inhabitants were conceded and never disputed by the sovereignties of Spain and Mexico (R. 3, 4); that at the time of the acquisition of New Mexico by the United States the Pueblo of Santa Rosa was the absolute owner with complete, perfect, and indefeasible title to the land described, and ever since that time has been in peaceable possession thereof (R. 5).

The bill also alleges that, contrary to the rights of the plaintiff, the Department of the Interior and the Land Office unlawfully offered for sale and are now offering for sale as a part of the public domain of the United States all the land described, and that patents to third parties have been granted covering portions of said land belonging to the Pueblo of Santa Rosa, and that the defendants were threatening to issue patents to other parties to portions of the said land; that the defendants have caused to be published and circulated, and are now publishing and circulating, maps purporting to be official maps of

the Interior Department of the lands of the Pueblo of Santa Rosa as a part of the public land of the United States (R. 5).

The prayer of the bill is for a mandatory injunction to restrain the defendants from interfering in any way with the exercise by the Pueblo of Santa Rosa, as owners and controllers of the land described in the bill of complaint, and to require them to correct all maps issued by them as official documents purporting to show that the land described is a part of the public domain (R. 9).

The defendants filed objections and a motion to dismiss said bill as permitted by Rule 32 of the Supreme Court of the District of Columbia (R. 11).

The motion to dismiss stated the following grounds:

First. That the bill shows on its face no capacity of the plaintiffs to begin and maintain this or any other suit, in that it fails to show that the Pueblo of Santa Rosa is a body politic incorporated or existing under any law of the United States or the State of Arizona.

Second. That there is no such thing existing in the State of Arizona, in law, as a "pueblo," with right to hold property or sue and be sued, but that the alleged pueblo is simply a tribe of Indians under the tutelage of the United States, occupying the public lands, the legal title to which is in the United States.

Third. That the bill shows no such title as authorizes the institution or maintenance of any action or suit in the name of the Pueblo of Santa Rosa.

Fourth. The bill shows on its face that the United States has legal title to the lands involved, the In-

dians merely occupying the land by sufferance and that the United States is therefore a necessary party to the suit.

Fifth. The bill seeks to control the discretionary action of the defendants in matters exclusively within their jurisdiction.

The Supreme Court of the District of Columbia sustained the motion to dismiss on the ground that the suit could not be maintained. (Opinion, R. 12 to 22.)

The Court of Appeals found that the plaintiff, at the time of the cession from Mexico, was of the same legal status as the New Mexican pueblos, whose title was recognized and confirmed in fee simple by Congress; that whatever power Congress may have to control the plaintiffs' land no such power had been asserted, and that therefore the Land Department had no power to open the lands to settlement and dispose of the mineral rights therein; and accordingly remanded the case with directions to the court below to issue a mandatory injunction (R. 24–37).

ASSIGNMENT OF ERRORS.

There are numerous errors assigned in the record, which may be reduced to two.

1. Error in holding that the Pueblo of Santa Rosa was a legal entity with capacity to maintain a suit.

2. Error in remanding the case with directions to the Supreme Court to award a mandatory injunction without leave to the appellees (appellants herein) to answer and set up the facts.

In support of these assignments of error we advance the following propositions:

I. The village or Pueblo of Santa Rosa is not a legal entity and has no capacity to maintain this suit, and no authority exists anywhere save in the General Government to maintain any action for this tribe of Papago Indians.

II. In any event, the decree is erroneous in awarding a perpetual injunction and mandate without opportunity for the defendants to answer, as prescribed in Rule 32 of the Supreme Court of the District of Columbia.

ARGUMENT.

I.

The village or pueblo of Santa Rosa is not a legal entity and has no capacity to maintain this suit, and no authority exists anywhere save in the General Government to maintain any action for this tribe of Papago Indians.

1. These Indians are wards of the Nation and they and their property are under the control and protection of the Government.

Santa Rosa is "a Papago village south of the Rio Gila and west of Tucson." Handbook of American Indians, part 2, p. 460. "The inhabitants of this village and the surrounding territory are Papago Indians closely allied to the Pimas." Handbook of American Indians, p. 200.

It is unnecessary to determine what was the legal status under the Spanish or Mexican rule, so far as affects its guardianship and protection of

dependent wards of the Nation. This is well stated in *United States* v. *Sandoval*, 231 U. S. 28, 45, where in considering the status of the Pueblo Indians of New Mexico, a tribe that also lived in pueblos or small villages, it was said:

> But it is not necessary to dwell specially upon the legal status of this people under either Spanish or Mexican rule, for whether Indian communities within the limits of the United States may be subjected to its guardianship and protection as dependent wards turns upon other considerations. See *Pollard* v. *Hogan*, 3 How. 212, 225. Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State.

It is too firmly and clearly established to admit of dispute that the tribes residing within the territorial limits of the United States are subject to their authority. *United States* v. *Rogers*, 4 How. 567, 572; *United States* v. *Kagama*, 118 U. S. 375, 384.

2. The legislative and executive branches of the Government have recognized these Indians as dependent wards of the Nation. The court will follow this determination.

An immense reservation was created for the Papago Indians in Arizona by Executive order No. 2300 of January 14, 1916, amended by the order of February 1, 1917. This reservation embraces the village of Santa Rosa and the surrounding territory. In addition to this reservation the following have from time to time been created (R. 20).

No. 1. San Xavier Reservation. By President Grant, July 1, 1874. See Executive orders relating to Indian reservations from May 14, 1855, to July 1, 1912. Washington, Government Printing Office, 1912, at page 23.

No. 2. Gila Bend Reservation. By President Arthur, December 12, 1882. (Executive orders, etc., p. 14.)

NOTE.—On June 17, 1909, President Taft "restored to the public domain" section 16 and sections 19 to 36 of lands within this reservation. (Executive orders, etc., p. 14.)

No. 3. Created by President Taft, June 16, 1911, being a part of section 7, township 21 south, range 6 east, Gila and Salt River meridian. (Executive orders, etc., p. 23.)

No. 4. Papago Reservation, created June 16, 1911, by President Taft, situate in township 17, range 5. (Executive orders, etc., p. 23.)

NOTE.—The description of Nos. 3 and 4, as given in "Executive orders," etc., were amended and modified by Executive Order No. 1655, dated December 5, 1912.

No. 5. Cockleburr, Tat-Mahmeli (or Tat-murl-ma-kot), and Chiu-Chiuschu (or Chur Chaw). Created May 28, 1912, by order of President Taft. (Executive orders, etc., p. 24.)

No. 6. Ah-Chin, etc. (Maricopa), created by order of President Taft, May 28, 1912. (Executive orders, etc., p. 24.)

No. 7. Reservation at Baboquivari, created by President Taft, December 5, 1912. (Executive order No. 1655.)

Appropriations have been made for the Papago Indians by Congress from time to time, and by the act of August 1, 1914, 38 Stat. 582, 588, money is appropriated for the improvement and sinking of wells for eight Papago Indian villages in southern Arizona, and on page 584 of the act $50,000 is appropriated for furnishing school facilities for the children of the Papago Tribe of Indians in Arizona, $5,000 of which is being spent in Santa Rosa.

In *Tiger* v. *Western Investment Company*, 221 U. S. 286, 315, it was held that it was for Congress and not for the courts to determine when the true interests of the Indian required his release from the condition of tutelage.

In *United States* v. *Holliday*, 3 Wall. 407, 419, the court said:

> In reference to all matters of this kind, it is the rule of this court to follow the executive and other political departments of the Government, whose more special duty it is to

> determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress. This control extends, as we have already shown, to the subject of regulating the liquor traffic with them. This power residing in Congress, that body is necessarily supreme in its exercise.

These decisions were affirmed in *United States* v. *Sandoval, supra.*

3. An Indian tribe or nation has no capacity to maintain a suit.

This was settled in the early decisions of this court in *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 18, where Chief Justice Marshall, speaking for the court, said:

> An Indian tribe or nation within the United States is not a foreign State in the sense of the Constitution and can not maintain an action in the courts of the United States.

This was affirmed in *United States* v. *Kagama*, 118 U. S. 375, 379, where Mr. Justice Miller said:

> And so in the case of *The Cherokee Nation* v. *The State of Georgia*, 5 Pet. 1, 20, brought in the Supreme Court of the United States, under the declaration that the judicial power extends to suits between a State and foreign States, and giving to the Supreme Court original jurisdiction where a State is a party, it was conceded that Georgia, as a State came within the clause, but held that the Cherokees

were not a State or nation within the meaning of the Constitution, so as to be able to maintain the suit.

These decisions have never been doubted, and in order that the nations or tribes composing the Five Civilized Tribes might sue in the courts of the United States Congress passed acts expressly empowering them so to do.

4. The fee simple title to the land is immaterial.

The question of whether the ultimate fee in the land in controversy is in the Indians or in the United States is immaterial in this case, for, at most, "it is a communal title" and "the lands are public lands of the pueblo." The situation is analogous to that of the Five Civilized Tribes, *United States* v. *Sandoval*, *supra*, p. 48, and as we have seen, those tribes, as well organized as could be claimed for the Papagos, had no capacity to sue except by the authorization of Congress.

The capacity to maintain this suit, therefore, does not depend upon the legal status of the Indians or the lands under Spain or Mexico, for their status in the United States is fixed in pursuance of the long-established policy of the United States as a superior and civilized nation to exercise a fostering care and protection over all the dependent Indian communities within its borders, whether in its original territory or in territory subsequently acquired, and to control them and their lands whether held by possessory title or by a communal title in fee.

5. The Kearney Act.

The Court of Appeals held that the village of the Pueblo of Santa Rosa is a corporation under the laws of the State of Arizona with capacity to sue, and it was urged, though not decided in that court, that it was a corporation by immemorial prescription. The ultimate claim that can be asserted is that found by the Court of Appeals that the legal status of this village was that of the New Mexican pueblos. The Indians of the New Mexican pueblos were held in the *Sandoval* case to be tribal Indians and they and their property to be under the control and protection of the United States.

In *United States* v. *Pico*, 5 Wall. 536, 540, while it was held that a pueblo, once formed and officially recognized, became entitled under the laws of Mexico to the use of certain lands for its benefit and the benefit of its inhabitants, it was further said:

> The disposition of the lands assigned was subject at all times to the control of the government of the country. The pueblo of Las Flores was an Indian pueblo and over the inhabitants the Government extended a special guardianship.

As the disposition of the lands of the pueblos of Mexico was subject to the control of the Mexican government and, since the cession from Mexico, subject to the control of the United States, no capacity to alienate or to sue or be sued for such lands existed in the pueblo. If the pueblos of New Mexico

have any capacity to sue, which is not necessary to be determined in this case, it is not by virtue of their legal status under Spanish and Mexican rule, but solely by reason of the act passed by the territorial legislature of New Mexico while General Kearney was military governor, and called in the record "the Kearney Act." The Laws of New Mexico, 1851–52, p. 418. For convenience, this is printed as a footnote.[1]

This act incorporates the inhabitants within the Territory of New Mexico "known by the name of the Pueblo Indians, and living in towns or villages." The Pueblo Indians are a distinct tribe of Indians, and this people in history "comprise the Tanoan, Keresan (Queres), and Zunian linguistic families of New Mexico, and the Hopi of Shoshonean affinity, in northeast Arizona." Handbook of American Indians, part 2, page 318.

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[1] An Act Entitled an act to enable Pueblo Indians to bring and defend actions.

Be it enacted by the General Assembly of the Territory of New Mexico:

Section 1. That the inhabitants within the Territory of New Mexico, known by the name of the Pueblo Indians, and living in towns or villages built on lands granted to such Indians by the laws of Spain or Mexico, and conceding to such inhabitants certain lands and privileges, to be used for the common benefit, are severally hereby created and constituted bodies politic and corporate, and shall be known in law by the name of the "Pueblo de ———," (naming it) and by that name they and their successors shall have perpetual succession; sue and be sued, plead and be impleaded, bring and defend in any court of law or equity, all such actions, pleas, and matters whatsoever, proper to recover, protect, reclaim, demand, or assert the right of such inhabitants, or any individual thereof, to any lands, tenements, or hereditaments, possessed, occupied, or claimed contrary to law by any person whatsoever, and to bring and defend all such actions, and to resist any encroachment, claim, or trespass made upon such lands, tenements, to hereditaments belonging to said inhabitants or to any individual.

Approved December, 1847.

From this publication it also appears that these people first became known to civilized people in 1539, and are called Pueblos on account of the peculiar style of compact permanent settlements as distinguished from temporary camps or scattered rancherias of less substantial houses. It is contended that in the act of the New Mexico Legislature there was the intent to incorporate all of the village Indians of New Mexico regardless of their tribal affiliations. This construction can not be maintained from the language of the statute itself, for if it had been the purpose of the legislature of New Mexico to incorporate all the village Indians of the Territory it would have left out "known by the name of the Pueblo Indians," and provided for the incorporation of all the Indian inhabitants of the Territory residing and living in towns or villages. The insertion of the tribal name of the Indians was for the purpose, of course, of limiting the effect of the law to the Indians known tribally as Pueblo. This statute can not be extended to the Papago villages or towns in Arizona. They had and have a distinct tribal name and are not ethnologically, historically, or legally known as Pueblo Indians, but as Papagos. Congress recognized the distinction between the Pueblos of New Mexico and the other Indians of New Mexico and Arizona in the enabling acts of those two States. (36 Stat. 557, 558.) Section 2 of this act directs that the constitutional convention of New Mexico shall provide by ordinance irrevocable, first, among other things, for prohibiting the sale of intoxicating liquors

to Indians and the introduction of liquors to Indian country, "which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico"; and in the 8th clause, prohibiting the sale of liquor on lands within an Indian reservation for twenty-five years after the same shall be disposed of, again declares that the term "Indian country" shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them. There is no such provision in the enabling act of Arizona. Congress recognized at that time that the Pueblos of New Mexico had a different status from the Papagos living in villages in Arizona.

From the foregoing, it is clear that the Papago Indians residing in small villages in Arizona are not legal entities with corporate capacity to sue and be sued, but are Indians under the care and protection of the General Government.

II.

In any event, the decree is erroneous in awarding a perpetual injunction and mandate without opportunity for the defendants to answer.

The defendants herein desire to show that the records of the General Land Office disclose that the President of the United States has included the lands in controversy within the reservation for the Papago Indians. This controverts the allegation in the bill that the Secretary of the Interior and the Commissioner of the General Land Office are patenting and

proposing to patent these lands to third parties, and accentuates the necessity of permitting the Secretary of the Interior and the Commissioner of the General Land Office, in the event the court should by any possibility hold that the Indians of the village of Santa Rosa have capacity to maintain this suit, to answer the allegations of the bill and set up the facts with regard to their efforts to protect and care for these dependent wards of the Government.

The whole case, involving the disposal of 720 square miles, or more than 460,000 acres of land, was finally disposed of, and permanent injunction granted, merely upon bill and motion to dismiss, without permitting defendants to answer on the merits and to deny, as they would if opportunity were given, every material allegation of fact in the bill.

It is submitted that this premature foreclosure of the defense violates elementary principles of equitable procedure, constitutes a dangerous precedent and involves grave injustice to defendants. Only through full disclosure of the defense by answer and proofs could the court obtain the complete understanding of the case necessary to a just and intelligent adjudication. If the motion to dismiss had been overruled, instead of sustained in the trial court, it is unquestionable that defendants would have been allowed to develop their defense by answer and proof. They had a right within five days to file an answer. Why, then, should they be in a worse position in the appellate court simply because the trial court

decided in their favor? It may be that a discretion rests in appellate courts, upon overruling a motion to dismiss, to direct a decree or to remand for further proceedings, but the former alternative can only be adopted where under no state of facts could the defendants prevail in whole or in part. It is *prima facie* inconsistent with the right of defendants to a full hearing and as well with the principle that the function of a demurrer, or motion to dismiss, is to demand the judgment of the court whether the defendant shall be compelled to answer the bill. It is submitted that in the case at bar the Court of Appeals in reversing should have remanded the case for answer and further proceedings.

The new Equity Rule No. 29, after abolishing demurrers and pleas and permitting defenses in point of law arising upon the face of the bill to be made by motion to dismiss or in the answer, provides:

> If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered.

Equity Rule No. 32 of the Supreme Court of the District of Columbia is practically identical with Federal Equity Rule No. 29. The time-honored principle is thus laid down that a defendant should have opportunity to first test the legal sufficiency of the bill by motion to dismiss, and, if unsuccessful, should still have opportunity to answer. In the recent case of

United States v. *Mackey*, 216 Fed. 126, a ruling in point was made in the appellate court. Here the United States filed a bill to quiet title to certain Indian lands. Demurrers were filed, treated by the trial court as motions to dismiss under the new Equity Rules, and sustained, whereupon the United States appealed from the decree dismissing the bill. In reversing this decision the Court of Appeals says (p. 127):

> We may properly say by way of premise that it would be unfortunate if the court should be compelled to decide the grave and important questions arising in this litigation, upon a mere motion to dismiss the bill and without the full presentation of the facts by way of lawful evidence.

And again (p. 128):

> The United States has never at any time had an opportunity to show by evidence that the allegations contained in paragraph 3 of the bill were true. On the contrary, they have been turned out of court by a finding that the Creek Nation had no right or interest in the land, and this not upon any showing of the United States, but upon a case gathered from the world at large.

The decision was as follows (p. 129):

> We think we can not do otherwise than reverse the decree of dismissal and remand the case with instructions to the trial court to deny the motions to dismiss *and allow the defendants to answer if they shall be so advised.* [Italics ours.]

The long-established practice of this court in like situations sustains our contention. *Davis* v. *Tileston*, 6 How. 114, was a bill in equity to enjoin a judgment. Defendants demurred to the bill, the demurrer was sustained, and the bill dismissed. An answer had also been filed a few days previous to the judgment, but for some reason was not considered, and the only question before this court was whether the judgment dismissing the bill on the demurrer was correct. The court held that it was not correct, but said (p. 118):

> But as the answer in the present decision must be put out of the question, and as the demurrer admits all facts duly alleged in the bill, the plaintiff seems entitled to judgment on these admissions, though, to prevent injustice by oversight or mistake, we shall take care to render such an opinion that the respondents can be enabled in the court below to avoid suffering, if they possess a real and sufficient defense to the bill.

The decision was (p. 121):

> The judgment below in favor of the demurrer is therefore reversed. But in order that justice may be done between these parties on the answer and any evidence either of them may wish to file, final judgment is not rendered here for the plaintiff, but the case is remanded, in order that leave may be given to the respondents to withdraw their demurrer, and the cause to be heard on the bill and answer, if no evidence is desired to be put in;

or on these and such evidence as the parties may wish to offer.

The court will note that the situation above presented, in so far as bill and motion to dismiss are concerned, is identical with the status of this case when it reached the Court of Appeals. We earnestly urge that the decision of that court was erroneous exactly in so far as it differed from the decision just quoted.

See also:

Erwin v. *Parham*, 53 U. S. 196, 206.
Clearwater v. *Meredith*, 62 U. S. 489, 493.
County of Dallas v. *Mackenzie*, 94 U. S. 660, 664.
Virginia v. *West Virginia*, 206 U. S. 290.

If this suit can be maintained and becomes final upon the pleadings, it will not only affect the right and title of the entire Papago Tribe but the Pimas, Maricopas, Mojaves, and perhaps other Indians, covering a vast territory in the State of Arizona and elsewhere.

CONCLUSION.

The judgment of the Court of Appeals of the District of Columbia is erroneous and should be reversed, and the judgment of the Supreme Court of the District dismissing the bill should be affirmed.

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